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5 UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
7 OAKLAND DIVISION

8 MARY ANN ADLAO and MARY
9 WILLIAMS, individually and on behalf of all
10 others similarly situated, and on behalf of the
general public,

11 Plaintiffs,

12 vs.

13 JPMORGAN CHASE & CO., JPMORGAN
14 CHASE BANK, N.A., and EMC
15 MORTGAGE CORP., as successors in
interest to BEAR STEARNS, INC., and
16 ENCORE CREDIT CORP., and Does 1-59,
inclusive,

17 Defendants.

Case No: C 10-04508 SBA

**ORDER DENYING DEFENDANTS'
MOTION TO COMPEL
ARBITRATION**

Dkt. 13

18
19 Plaintiffs Mary Ann Adlao (“Adlao”) and Marian Williams (“Williams”) bring the
20 instant wage and hour collective and class action on behalf of themselves and all others
21 similarly situated against JPMorgan Chase & Co., JPMorgan Chase Bank, N.A., and EMC
22 Mortgage Corp. (“EMC”), as successors-in-interest to Bear Stearns, Inc., and Encore Credit
23 Corporation. Plaintiffs allege that Defendants misclassified them as “exempt” employees
24 and, inter alia, failed to pay them overtime wages or provide them with meal and rest
25 periods in violation of the Fair Labor Standard Act (“FLSA”), 29 U.S.C. § 207, and various
26 California laws.

27 The parties are presently before the Court on Defendants’ Motion to Compel
28 Arbitration and Stay Judicial Proceedings, and Defendants’ ancillary request to stay the

1 action pending the Supreme Court's ruling in AT&T Mobility LLC v. Concepcion, Sup. Ct.
 2 Docket No. 09-893. Dkt. 13. Having read and considered the papers filed in connection
 3 with this matter and being fully informed, the Court hereby DENIES the motion and
 4 request for stay, without prejudice, for the reasons set forth below. The Court, in its
 5 discretion, finds this matter suitable for resolution without oral argument. See Fed. R. Civ.
 6 P. 78(b); N.D. Cal. Civ. L.R. 7-1(b).

7 **I. BACKGROUND**

8 **A. FACTUAL SUMMARY**

9 Plaintiff Adlao, a resident of San Ramon, California, has been employed by
 10 Defendants since 2003 as an Appraiser. Compl. ¶ 5. On or about November 9, 2006,
 11 Adlao countersigned an offer letter which was presented to her by Bear Sterns Residential
 12 Mortgage Corporation ("BSRM"). Lowell Decl. ¶ 5 & Ex. A. As part of the offer, Plaintiff
 13 was required to sign a separate arbitration agreement, styled as an "Arbitration of Disputes"
 14 ("2006 Arbitration Agreement"), which was attached as Exhibit A to her employment offer
 15 letter. Id. The salient portion of the 2006 Arbitration Agreement, which Adlao signed on
 16 the same date, states that:

17 You and the Company both specifically and knowingly and
 18 voluntarily agree to a pre-dispute arbitration clause so that
 19 should any controversy or dispute arise in connection with your
 20 employment, the cessation of your employment, or the
 21 interpretation of this offer letter, you and the Company agree to
 22 arbitrate any and all such claims before a neutral panel of the
 23 National Association of Securities Dealers, Inc. ("NASD") or
 24 the New York Stock Exchange, Inc. ("NYSE") (pursuant to
 25 their respective rules, including those related to discovery) at a
 26 site in Los Angeles, California. In the event both the NASD
 27 and the NYSE decline jurisdiction in connection with any such
 28 matter, the parties agree instead to arbitration to be
administered by JAMS pursuant to its Employment Arbitration
Rules & Procedures and subject to JAMS Policy on
Employment Arbitration Minimum Standards of Procedural
Fairness at a JAMS hearing site in Los Angeles, California.

...

The parties' agreement to arbitrate disputes includes, but is not
 limited to, any claims [under] ... the state and local laws of Los
 Angeles and California, including but not limited to ... the
California Labor Code, and any other federal, state or local
law ... relating to wage and hour claims, and any other statutory

or common law claim. You and the Company agree that arbitration shall be the exclusive forum for resolving all disputes arising out of or relating to employment with BSRM, the cessation of that employment, or the interpretation of this offer letter.

Id. (emphasis added).

On February 13, 2007, Adlao signed a second arbitration agreement (“2007 Arbitration Agreement”). Id. ¶ 6 & Ex. B. The salient part of the second agreement provides as follows:

In consideration for my employment or continued employment with Bear Stearns & Co, Inc., any of its affiliates and subsidiaries, including but not limited to, Bear Stearns Securities, Corp.; EMC; Bear Stearns Mortgage Capital Corporation; and Custodial Trust Company (together referred to herein as “Bear Stearns” or the “Firm”), Bear Stearns and I (the “Parties”) hereby agree to arbitrate any and all such controversies, disputes and claims before a neutral panel of the National Association of Securities Dealers, Inc. (pursuant to its rules, including those related to discovery) in the location nearest to the office where I work.

...

The Parties’ agreement to arbitrate disputes includes, but is not limited to, ... any claims relating to wage and hour claims and any other statutory or common law claims.

Lowell Decl. ¶6, Exh. B.

Co-plaintiff Williams, currently a resident of Arizona, began working for Defendants in July 2006. Compl. ¶ 6. On or about November 7, 2006, Williams signed an offer letter and an attachment entitled Arbitration of Disputes. The arbitration agreement is identical to the one signed by Adlao in 2006. Lowell Decl. ¶ 7, Ex. C. Williams worked in California from 2006 to 2008, and has worked from her home in Arizona from 2008 to the present. Compl. ¶ 6. Unlike Adlao, there is no evidence or allegation that Williams signed a second arbitration agreement.

B. PROCEDURAL HISTORY

On October 5, 2010, Plaintiffs filed the instant action against Defendants JPMorgan Chase & Co., JPMorgan Chase Bank, N.A., and EMC. The six claims for relief are as follows: (1) violation of the FSLA; (2) violation of California Labor Code §§ 510, 1194

1 and 1198; (3) failure to provide itemized wage and hour statements in violation of Labor
2 Code § 226; (4) failure to indemnify for business expenses in violation of Labor Code
3 § 2802; (5) failure to provide and/or authorize meal and rest periods in violation of Labor
4 Code §§ 512 and 226.7; and (6) violation of California Business & Professions Code
5 § 17200.¹

6 The case originally was assigned to Magistrate Judge Edward Chen. On November
7 9, 2010, Defendants filed a declination to proceed before a magistrate judge. Dkt. 10.
8 Before the case was reassigned to this Court, however, Defendants filed the instant motion
9 to compel arbitration without first meeting and conferring with Plaintiffs. Schwartz Decl. ¶
10 2, Dkt. 25. In its response to the motion, Plaintiffs state that they are amenable to
11 submitting their claims to arbitration, but that the arbitration must proceed before JAMS,
12 not FINRA. See Pls.' Opp. at 1, 3, Dkt. 24.² In particular, Plaintiffs point out that under
13 the FINRA Code of Arbitration for Customer Disputes § 12200, FINRA only accepts
14 arbitrations from members or customers of its member banks, and that Plaintiffs are neither.
15 Id. In addition, they assert that under § 12204, FINRA will not entertain class arbitrations.
16 Id.

17 In their reply, Defendants counter that FINRA's rules governing Customer Disputes
18 are inapposite, and that under its Code of Arbitration Procedure for Industry Disputes,
19 FINRA may consider employment claims, provided that the parties have agreed to arbitrate
20 of those claims before FINRA. See Defs.' Reply at 3-4, Dkt. 30. Defendants do not cite

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22 ¹ Federal wage claims cannot be filed as a class action under Rule 23, and instead,
23 must be maintained as a "collective action." 29 U.S.C. § 216(b). "A 'collective action'
24 differs from a class action." McElmurry v. U.S. Bank Nat. Ass'n, 495 F.3d 1136, 1139 (9th
25 Cir. 2007). In a class action brought under Rule 23, all members of a certified class are
bound by the judgment unless they opt-out of the suit. Id. In contrast, in a collective action
under the FLSA, 29 U.S.C. § 216(b), only those claimants whose affirmatively opt-in by
providing a written consent are bound by the results of the action. Id.

26 ² Plaintiffs do not agree that their claims for injunctive relief under the UCL are
27 arbitrable. See Cardenas v. AmeriCredit Fin. Servs. Inc., No. C 09-4978 SBA, 2010 WL
28 3619851, at *8-*9 (N.D. Cal. Sept. 13, 2010) (finding that UCL claims for injunctive relief
cannot be arbitrated).

1 any particular section of the Industry Disputes Code to support of their argument.
2 Additionally, Defendants argue, for the first time, that the Court should stay the action
3 pending the Supreme Court's forthcoming decision in Concepcion. See id. at 10-11.³
4 Defendants did not meet and confer with Plaintiffs regarding their proposal to temporarily
5 stay the action pending a decision in Concepcion. Because Defendants inappropriately
6 included their stay request for the first time in their reply, the Court granted both parties
7 leave to file surreply briefs with respect to Defendants' stay request. Dkt. 37, 40.⁴

8 In their surreply, Plaintiffs contend that a stay is unnecessary; however, in the event
9 the Court is inclined to stay the proceedings, Plaintiffs request that the Court equitably toll
10 the statute of limitations to avoid prejudice to the class. See Pls.' Surreply at 2-6, Dkt. 37.
11 In turn, Defendants filed a response to Plaintiffs' surreply in which they continue to
12 advocate for a stay, but oppose Plaintiffs' request for equitable tolling. See Defs.'
13 Response to Surreply at 4-6, Dkt. 40. The Court discusses these issues seriatim.

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18 ³ The question presented in the writ petition filed in Concepcion is: "Whether the
19 Federal Arbitration Act preempts States from conditioning the enforcement of an
20 arbitration agreement on the availability of particular procedures - here, class-wide
21 arbitration - when those procedures are not necessary to ensure that the parties to the
arbitration agreement are able to vindicate their claims." See Pet. for a Writ of Cert., No.
09-893, 2010 WL 304265, at *i (U.S. Jan. 25, 2010).

22 ⁴ Defendants concede that they did not meet and confer with Plaintiffs prior to filing
23 their motion to compel arbitration, but attempt to excuse their failure to do so on the ground
24 that Magistrate Judge Chen's Standing Orders contain no such requirement. See Defs.'
25 Reply at 2. Defendants assert that after the case was reassigned to this Court, "in
26 recognition and in compliance with this Court's Standing Orders for Civil Cases," they met
27 and conferred with Plaintiffs' counsel regarding the issues raised in their motion. Id.
28 However, the record shows that it was Plaintiffs—not Defendants—who initiated the meet
and confer process. See Schwartz Decl. ¶ 4. Even then, it took Defendants almost a month
to respond to Plaintiffs' request to meet and confer. Id. Moreover, Defendants fail to
explain why they made no effort to meet and confer regarding their request to stay the
action, which they made after the case was reassigned to this Court. As will be discussed
below, Defendants' failure to meet and confer with opposing counsel has resulted in
piecemeal and inchoate briefing of issues critical to this Court's ability to make an
informed decision on the pending issues and requests.

1 II. DISCUSSION

2 A. MOTION TO COMPEL ARBITRATION

3 1. Legal Standard

4 Under the Federal Arbitration Act (“FAA”), any party bound by an arbitration
 5 agreement that falls within the scope of the FAA may bring a petition in federal district
 6 court to compel arbitration. 9 U.S.C. § 4. When faced with a petition to compel
 7 arbitration, the district court’s role is a discrete and narrow one. “By its terms, the [FAA]
 8 ‘leaves no place for the exercise of discretion by a district court, but instead mandates that
 9 district courts shall direct the parties to proceed to arbitration on issues as to which an
 10 arbitration agreement has been signed.’” Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207
 11 F.3d 1126, 1130 (9th Cir. 2000) (quoting Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213,
 12 218 (1985)). “The court’s role under the Act is therefore limited to determining
 13 (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement
 14 encompasses the dispute at issue.... If the response is affirmative on both counts, then the
 15 Act requires the court to enforce the arbitration agreement in accordance with its terms.”
 16 Id. All doubts are to be resolved in favor of arbitrability. Moses H. Cone Mem’l Hosp. v.
 17 Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

18 2. Analysis

19 To determine the scope of the parties’ arbitration agreement, the Court applies
 20 “ordinary state-law principles that govern the formation of contracts.” First Options of
 21 Chicago, Inc v. Kaplan, 514 U.S. 938, 944 (1995). Under California law, contracts are to
 22 be interpreted to give effect to the mutual intention of the parties at the time of contracting.
 23 Cal. Civ.Code § 1638; Waller v. Truck Ins. Exch., 11 Cal.4th 1, 18 (1995). “[S]uch intent is
 24 to be inferred, if possible, solely from the written provisions of the contract,” read in their
 25 ordinary and popular sense, unless it appears the parties used the terms in some special
 26 sense. AIU Ins. Co. v. FMC Corp., 51 Cal.3d 807, 822 (1995) (citing Cal.Civ.Code
 27 § 1639). “If the contract language is clear and explicit, it governs.” Foster-Gardner, Inc. v.
 28 National Union Fire Ins. Co., 18 Cal.4th 857, 868 (1998) (internal quotations and citation

1 omitted). The “interpretation of a contract generally presents a question of law for this
2 court to determine[.]” DVD Copy Control Ass’n, Inc. v. Kaleidescape, Inc., 176
3 Cal.App.4th 697, 713 (2009).

4 The starting point for interpreting any agreement is the language of the agreement
5 itself. See Mt. Diablo Med. Cntr. v. Health Net of Calif, Inc., 101 Cal.App.4th 711, 722
6 (2002). Here, the arbitration agreement states, in relevant part, that the parties agree to
7 arbitrate any employment-related disputes “before a neutral panel of the National
8 Association of Securities Dealers, Inc. (“NASD”) or the New York Stock Exchange, Inc.
9 (“NYSE”),” and that “[i]n the event both the NASD and the NYSE decline jurisdiction in
10 connection with any such matter, the parties agree instead to arbitration to be administered
11 by JAMS” Lowell Decl. Ex. A. Though raised by none of the parties, the Court notes
12 that by its express terms, the arbitration agreement only requires the employee to present
13 his or her employment-related claims to arbitration before either the NASD or the NYSE.
14 There is no requirement that Plaintiffs arbitrate their claims before FINRA. Though
15 Defendants appear to suggest that the Court should substitute FINRA in place of NASD
16 and NYSE as the successor to those entities, they fail to cite any provision of the arbitration
17 agreement or any legal authority to support such a conclusion.

18 The parties’ arguments are likewise unhelpful with respect to Plaintiffs’ counter-
19 request to proceed before JAMS. The identically-worded 2006 Agreements executed by
20 Adlao and Williams both state that “[i]n the event both the NASD and the NYSE decline
21 jurisdiction in connection with any such matter, the parties agree instead to arbitration to be
22 administered by JAMS” Id. However, Adlao signed a second arbitration agreement
23 which states that the parties “hereby agree to arbitrate any and all such controversies,
24 disputes and claims before a neutral panel of the National Association of Securities Dealers,
25 Inc.” Lowell Decl. ¶6, Exh. B. The 2007 Agreement makes no reference to proceeding
26 before FINRA or JAMS. Nor do the parties discuss which arbitration agreement is
27 controlling with respect to the claims of Adlao or what effect, if any, the lack of reference
28 to FINRA and/or JAMS has with respect to Defendants’ motion to compel arbitration

1 before FINRA and Plaintiffs' counter-request to arbitrate before JAMS. Given the lack of
 2 discussion or analysis regarding the aforementioned issues, the Court cannot make a fully
 3 informed decision as to whether to compel arbitration, and if so, whether FINRA or JAMS
 4 is the appropriate forum in which such arbitration should proceed. See Indep. Towers of
 5 Wash. v. Wash., 350 F.3d 925, 929 (9th Cir. 2003) ("Our adversarial system relies on the
 6 advocates to inform the discussion and raise the issues to the court."). The Court therefore
 7 denies Defendants' motion to compel arbitration, without prejudice.⁵

8 **B. DEFENDANTS' REQUEST TO STAY PENDING CONCEPCION**

9 As an alternative matter, Defendants contend that the Court should stay the instant
 10 action pending the Supreme Court's decision in Concepcion. Defs.' Reply at 10-11. A
 11 federal court has discretionary authority to stay an ongoing proceeding, which is "incidental
 12 to the power inherent in every court to control the disposition of the causes on its docket
 13 with economy of time and effort for itself, for counsel, and for litigants." Landis v. N. Am.
 14 Co., 299 U.S. 248, 254 (1936). The power to stay the proceedings extends to stays pending
 15 resolution of separate judicial proceedings, and does not require the issues in such
 16 proceedings to be determinative of the action before the court. Leyva v. Certified Grocers,
 17 593 F.2d 857, 863-64 (9th Cir. 1979). In determining whether a stay is appropriate, the
 18 court must consider "the possible damage which may result from the granting of a stay, the
 19 hardship or inequity which a party may suffer in being required to go forward, and the
 20 orderly course of justice measured in terms of the simplifying or complicating of issues,
 21 proof, and questions of law which could be expected to result from a stay." Landis, 299
 22 U.S. at 254; accord Lockyer v. Mirant Corp., 398 F.3d 1098, 1110 (9th Cir. 2005).

23 Notably, Defendants make no attempt to frame their request in accordance with
 24 Landis or its progeny. See Defs.' Reply at 11. Instead, Defendants belatedly attempt to
 25 make such a showing in their response to Plaintiffs' surreply. See Defs.' Response to Pls.'
 26

27 ⁵ The resolution of these issues precedes the Court's consideration of the remaining
 28 issues presented in the parties' respective memoranda. Therefore, the Court does not reach
 those matters at this time.

1 Surreply at 2-3. In addition, Defendants' response presents extensive argument in support
2 of their opposition to Plaintiffs' request that the Court equitably toll the statute of
3 limitations as to Plaintiffs' FSLA claims in the event of a stay. The flaw in Defendants'
4 back-ended approach is that it deprives Plaintiffs of the opportunity to address arguments
5 that Defendants should have made in its moving papers. See Ahanchian v. Xenon Pictures,
6 Inc. 624 F.3d 1253, 1263 (9th Cir. 2010) ("Our adversarial system depends on the
7 principle that all sides to a dispute must be given the opportunity to fully advocate their
8 views of the issues presented in a case."). That flaw is even more glaring here, where
9 Defendants improperly presented their stay request in their reply brief—without first
10 meeting and conferring with Plaintiffs. Due to Defendants' unfortunate approach to motion
11 practice, the Court declines to consider Defendants' stay request at this juncture.

12 **III. CONCLUSION**

13 For the reasons set forth above,

14 **IT IS HEREBY ORDERED THAT:**

15 1. Defendants' motion to compel arbitration and alternative request to stay the
16 proceedings pending the Supreme Court's decision in Concepcion are DENIED without
17 prejudice. Should Defendants desire to renew their motion, they shall first conduct a face-
18 to-face meet and confer regarding all issues to be adjudicated in such motion and certify in
19 writing that they have done so prior to renewing their motion. Any renewed motion and
20 opposition thereto may not exceed fifteen (15) pages and the reply may not exceed ten (10)
21 pages.

22 2. The telephonic Case Management Conference currently scheduled for March
23 9, 2011 is CONTINUED to **June 16, 2011 at 3:15 p.m.** Prior to the date scheduled for the
24 conference, the parties shall meet and confer and prepare a joint Case Management
25 Conference Statement. The joint statement shall be filed no later than ten (10) days prior to
26 the conference and shall comply with the Standing Order for All Judges of the Northern
27 District of California and the Standing Order of this Court. Plaintiffs shall be responsible
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1 for filing the statement as well as for arranging the conference call. All parties shall be on
2 the line and shall call (510) 637-3559 at the above indicated date and time.

3 3. This Order terminates Docket 13.

4 IT IS SO ORDERED.

5 Dated: March 10, 2011


6 SAUNDRA BROWN ARMSTRONG
7 United States District Judge
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